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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JAMES TITMAN, Defendant and Appellant.	C085354 (Super. Ct. No. 17FE000405)

Defendant James Titman appeals from his conviction for causing serious bodily injury while resisting a peace officer, resisting an executive officer in the performance of duty, and providing false identification to a police officer. He contends insufficient evidence supported his false identification conviction, the trial court erred by not instructing the jury on simple assault as a lesser included offense of resisting an executive officer, and the prosecutor committed misconduct by misstating the law during closing argument. Additionally, defendant requests that we review the sealed transcript of the in

camera hearing on his *Pitchess*[1] motion to ensure the trial court properly followed appropriate procedures. We reverse the false identification conviction for insufficient evidence and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On January 5, 2017, just before 1:00 a.m., Sacramento Police Officers Helen Mortlock and Micah Kraintz responded to a report that two subjects had jumped the fence at Cal Expo. Upon arriving at Cal Expo, the officers saw defendant walking in a parking lot wearing blue latex gloves, dark clothing, and one or two full backpacks.

Officer Kraintz drove the patrol car toward defendant, and defendant approached the car. While still in the car and without the car's lights activated, Kraintz asked defendant if he had been jumping fences; defendant denied he had. Kraintz recognized defendant as a parolee, but he did not remember defendant's name. He asked defendant's name, and defendant responded "Jim Rogers." Officer Mortlock began a records check for that name.

The two officers' testimony regarding the subsequent events differed slightly. Kraintz testified that he got out of the patrol car and asked defendant if he was wanted for a parole violation. Defendant pushed past him and attempted to run away, but Kraintz grabbed defendant by his backpack. Defendant then spun around and grabbed Kraintz around the waist. In response, Kraintz threw several punches, landing one on the back of defendant's head. Kraintz then kneed defendant in the stomach, and they both fell to the ground. Kraintz was able to pin defendant on the ground, but defendant pulled his hands away when Kraintz tried to grab his hand. Mortlock and another officer (who had just arrived) assisted Kraintz and arrested defendant. Defendant did not attempt to grab Kraintz's gun or other tools or weapons on the officer's belt.

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[1] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

Officer Mortlock testified that Kraintz asked defendant if he was on parole, and as he was getting out of the car, he reached through the window, grabbed defendant, and told defendant to stop. She did not see defendant push Kraintz, but she recalled that Kraintz initially grabbed defendant because he was trying to get away. Mortlock got out of the car and saw defendant's arms around Kraintz's waist. She saw Kraintz knee defendant and then strike him two or three times. Defendant and Kraintz fell to the ground, and she went to the front of the car to help Kraintz. Defendant actively resisted the officers' attempts to arrest him. Another officer then arrived, and they arrested defendant.

Defendant's statements to police were admitted at trial. He stated Kraintz approached him and asked his name. He told Kraintz his name was "Jimbo," and Kraintz told him he was on parole. Kraintz pushed him, and they fell to the ground. Kraintz then "continually punched [him] in the face." He did not fight back.

During the altercation, Kraintz sustained a fracture with comminution of the base of the fifth metacarpal on his right hand. He wore a splint for a week and a soft cast for seven weeks. He felt moderate pain, but he did not require surgery and did not lose feeling in his hand. After the cast was removed, Kraintz underwent physical therapy.

The jury found defendant guilty of proximately causing serious bodily injury while resisting a peace officer (Pen. Code, § 148.10, subd. (a); count one),[2] resisting an executive officer in the performance of duty (§ 69; count two), and providing false identification to a police officer (§ 148.9, subd. (a); count three). In bifurcated proceedings, the jury found true allegations that defendant sustained four prior convictions and served three prior prison terms, including an offense constituting a violent felony. (§ 667.5, subd. (c).)

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[2] Further undesignated statutory references are to the Penal Code.

The trial court sentenced defendant to two years in prison for count one, doubled to four years for the prior strike, and two years for count two, doubled to four for the prior strike and stayed pursuant to section 654. The court also imposed a sentence of 180 days for count three, concurrent to the sentence for count one, and three consecutive one-year terms for defendant's three prior convictions. (§ 667.5, subd. (b).)

DISCUSSION

I

Insufficient Evidence of False Identification

Defendant contends that insufficient evidence supported the false identification conviction. The People properly concede the issue.

The standard for judicial review of a criminal conviction challenged as lacking evidentiary support is well established: "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "If the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078.) A conviction will not be reversed for insufficient evidence unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

The jury found defendant guilty of violating section 148.9, subdivision (a), which provides in part: "Any person who falsely represents or identifies himself or herself as another person or as a fictitious person to any peace officer . . . *upon a lawful detention or arrest of the person* . . . to evade the proper identification of the person by the investigating officer is guilty of a misdemeanor." (*In re Voeurn O.* (1995)

35 Cal.App.4th 793, 795-796.) To violate section 148.9, a person must be under lawful detention or arrest at the time he or she provides false identification. (*Voeurn O.*, at p. 796.)

When defendant provided a false name to Kraintz, the officers were still in their patrol car, they had not activated the car's overhead lights, and neither officer had commanded defendant to do anything. In short, defendant was neither detained nor arrested at the time he provided false information. (See *Florida v. Bostick* (1991) 501 U.S. 429, 434 [merely approaching someone and asking a few questions is a consensual encounter, not a seizure]; *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1251, 1253-1254 [consensual encounter when officers ask for and check identification; seizure only occurs "when the officer, by means of physical force or show of authority, in some manner restrains the individual's liberty"].) Therefore, the conviction is not supported by substantial evidence, and we reverse. Because the court imposed a concurrent sentence for that count, there is no need to remand.

II

Lesser Included Offense Instruction

Defendant argues the trial court prejudicially erred in failing to instruct sua sponte on simple assault (§ 240) as a lesser included offense of resisting an executive officer in the performance of duty (§ 69). He contends a reasonable jury could have found that Officer Kraintz used unreasonable or excessive force in detaining him and that he used unreasonable force in responding to Kraintz's use of force. We disagree.

A. *The Law*

"The court must instruct on a lesser included offense, even if not requested to do so, 'when the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense.' [Citations.]" (*People v. Melton* (1988) 44 Cal.3d 713, 746.) But a trial court is only required to instruct on a lesser included offense where there is substantial evidence

that, if believed, absolves the defendant's guilt on the greater offense, but not on the lesser. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) "Evidence is substantial if 'a reasonable jury could find [it] persuasive.' [Citation.]" (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137.) In addressing whether substantial evidence exists of a lesser included offense, trial courts " 'should not evaluate the credibility of witnesses, a task for the jury.' " (*Ibid*.) Whether a trial court improperly failed to instruct on a lesser included offense is reviewed de novo. (*Waidla*, at p. 733.)

"To determine whether a lesser offense is necessarily included in the charged offense, one of two tests (called the 'elements' test and the 'accusatory pleading' test) must be met. The elements test is satisfied when ' "all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense." [Citation.]' [Citations.] Stated differently, if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former. [Citations.] [¶] Under the accusatory pleading test, a lesser offense is included within the greater charged offense ' "if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed." [Citation.]' [Citations.]" (*People v. Lopez* (1998) 19 Cal.4th 282, 288-289.)

A violation of section 69 can occur in two circumstances. " 'The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer in the performance of his or her duty.' [Citation.]" (*People v. Smith* (2013) 57 Cal.4th 232, 240.) "The second way of violating section 69 expressly requires that the defendant resist the officer 'by the use of force or violence,' and it further requires that the officer was acting lawfully at the time of the offense. [Citation.]" (*Id.* at p. 241.)

Assault is defined as " 'an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.' [Citation.]" (*People v. Chance* (2008) 44 Cal.4th 1164, 1167.) An "assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*People v. Williams* (2001) 26 Cal.4th 779, 790.)

B. *Analysis*

Here, the amended information alleged that defendant "did unlawfully attempt by means of threats and violence to deter and prevent [police officers] from performing a duty imposed upon such officer by law, and did knowingly resist by the use of force and violence said executive officer in the performance of his/her duty." Because the information alleged in the conjunctive that defendant violated both forms of section 69, it was not possible for defendant to violate section 69 as charged without also committing simple assault. Therefore, under the accusatory pleading test, simple assault is a necessarily included offense of resisting an executive officer.

Defendant relies on *People v. Brown* (2016) 245 Cal.App.4th 140, to argue that a reasonable jury could have found him guilty of assault but not resisting an executive officer. The court in *Brown* observed, " '[w]hen excessive force is used by a defendant in response to excessive force by a police officer . . . defendant [may] be convicted, and then the crime may only be a violation of section 245, subdivision (a) or of a lesser necessarily included offense within that section,' such as section 240. [Citations.]" (*Id.* at p. 155.) In *Brown*, two police officers testified that the defendant assaulted them while resisting arrest. The defendant testified that he lay on the ground, not resisting, after initially fleeing from the officers. An officer then jumped on him and hit him in the head three times. The jury found defendant guilty of violating section 69. The appellate court concluded that the trial court should have instructed on the lesser included offense of

simple assault because the jury could have credited the defendant's version of events that the officers used unreasonable or excessive force while also crediting the officers' version of events that the defendant responded to their use of excessive force with unreasonable force of his own. (*Brown*, at pp. 154-155.) Under those facts, the court concluded, the jury could have found defendant guilty of assault and not of resisting an executive officer. (*Id.* at p. 155.)

Brown is distinguishable from the instant case. Here, substantial evidence does not support a finding that defendant could be guilty of assault but not guilty of resisting an executive officer. If the jury credited the officers' testimony, a reasonable jury could not find that Kraintz used excessive or unreasonable force in grabbing defendant by the backpack. The test for determining whether an officer used unreasonable or excessive force in making an arrest "is whether the amount of force the officers used in making the arrest was objectively unreasonable given the circumstances they faced." (*Allgoewer v. City of Tracy* (2012) 207 Cal.App.4th 755, 763.) At least three factors are considered in determining objective reasonableness: (1) the severity of the offense for which the suspect was arrested, (2) the immediacy of the threat that the suspect posed to the officer, and (3) whether the suspect was fleeing or actively resisting. (*Graham v. Connor* (1989) 490 U.S. 386, 396.) By grabbing defendant's backpack, Kraintz used objectively reasonable force in stopping defendant from leaving the scene.

If the jury credited defendant's version of events, there is substantial evidence that Kraintz used excessive or unreasonable force in detaining defendant. Defendant told an officer at the scene that Kraintz pushed him and "continually" punched him. He also said he did not fight back. In that scenario, a reasonable jury could find that Kraintz used unreasonable or excessive force, but there is no evidence defendant exerted unreasonable force in responding to Kraintz's use of force. Therefore, defendant would not be guilty of resisting an executive officer *or* assault.

If the jury credited portions of both the officers' testimony and the defendant's statements, as in *Brown*, there is still not substantial evidence that defendant committed assault but not resisting arrest. In that scenario, Kraintz pushed defendant to the ground and then "continually" punched him. In response, Kraintz and defendant somehow rose to their feet--a fact not supported by the evidence--and defendant grabbed Kraintz around the waist. Beyond the fact that this scenario is completely unsupported by the evidence, we observe that defendant's response to being pushed and punched would be at most proportional to, and certainly not excessive to, the unreasonable or excessive force exerted by Kraintz. Therefore, defendant would be guilty of neither resisting an executive officer nor simple assault.

Because a reasonable jury could not find that defendant was guilty of simple assault and not guilty of resisting an executive officer, the trial court did not err by failing to instruct the jury on simple assault.

III

Prosecutorial Misconduct

Defendant contends the prosecutor committed misconduct in closing argument by misstating the law regarding serious bodily injury by asserting that a bone fracture necessarily constitutes a serious bodily injury, regardless of severity. We disagree that the statement was misconduct.

Defendant concedes that he did not object to the perceived prosecutorial misconduct or request an admonishment at trial, and therefore his claim is forfeited. (See *People v. Perez* (2018) 4 Cal.5th 421, 450 ["To avoid forfeiture of a claim of prosecutorial misconduct, a defendant must object and request an admonition"].) He argues in the alternative that his trial counsel was constitutionally ineffective by failing to object to the prosecutor's misstatement. He also requests that we use our discretion to consider the issue here because it affects his fundamental rights. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6; *People v. Covarrubias* (2016) 1 Cal.5th 838, 894 [a

prosecutor's misconduct violates the United States Constitution when it "infects the trial with such unfairness as to make the conviction a denial of due process"].) In the interest of judicial economy given defendant's claim of ineffective assistance of counsel, we reach the merits of the claim.

A. *Background*

The trial court instructed the jury with CALCRIM No. 2655, which includes a definition of serious bodily injury: "A *serious bodily injury* means a serious impairment of physical condition. Such an injury may include, but is not limited to: bone fracture, protracted loss or impairment of function of any bodily member or organ, a wound requiring extensive suturing, and serious disfigurement." The court orally instructed the jury with an almost identical instruction: "A serious bodily injury means a serious impairment to physical condition. Such an injury may include, but is not limited to, bone fracture, protracted loss or impairment of function of any bodily member or organ, a wound requiring extensive suturing, or serious disfigurement."

In closing, the prosecutor argued: "[U]nder the law, when you are given a specific definition, you are expected to abide by that definition and what it is under the law. And under the law, it's very clear. There's no disputing that a bone fracture constitutes serious bodily injury." On rebuttal, the prosecutor argued: "On the item of he did not cause the serious bodily injury, [defense counsel] argued this is not serious bodily injury, members of the jury, this slide I have quoted to you directly out of law. This is the law that was given, came from the legislature through the Judicial Council. I don't choose these words. They were chosen by people much smarter than me who have determined and have defined specifically under the law what serious bodily injury is, and they chose the words that includes 'bone fracture.' In no uncertain terms they said, 'Such injuries include, but are not limited to, bone fracture and the protracted loss of impairment of a bodily member.' [¶] Those were those words. It's right out of the law. This is unquestionably a serious bodily injury."

B. *Law and Analysis*

It is improper for a prosecutor to misstate the law. (*People v. Hill* (1998) 17 Cal.4th 800, 829.) Nevertheless, "[a] prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence. [Citation.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 726.) " 'When, as here, the point focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citation.]" (*People v. Thomas* (2012) 53 Cal.4th 771, 797.)

"Serious bodily injury" for purposes of section 148.10 is defined as "a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement." (§ 243, subd. (f)(4).)

Despite the plain language of the statute stating that a bone fracture is a serious bodily injury, defendant cites *People v. Nava* (1989) 207 Cal.App.3d 1490 for the proposition that not all bone fractures are necessarily serious bodily injuries. *Nava* involved a jury instruction stating that great bodily injury under section 12022.7 means "a significant or substantial physical injury" and that "a bone fracture was a significant and substantial injury within the meaning of section 12022.7." (*Id.* at p. 1495.) The *Nava* court concluded that the instruction amounted to a directed verdict by removing from the trier of fact the duty to determine whether the physical injury was "substantial and significant." (*Id.* at p. 1498.) In so doing, the court referred to the definition of serious bodily injury under then section 243, subdivision (e) as a "serious impairment of physical condition." (*Nava,* at p. 1497.) The court observed that "bone fracture" is listed as an example of a serious impairment. (*Ibid.*) The court then stated, "In the context of the section, and when viewed in light of the above analysis of section 12022.7, we do not

take this to mean that every bone fracture is serious bodily injury but merely that it can be if it results in a serious impairment of physical condition." (*Id.* at pp. 1497-1498.)

The court in *Nava* was concerned with an instruction regarding great bodily injury under section 12022.7, not section 243, and therefore the court's discussion of section 243 is dicta. Moreover, the plain language of section 243, subdivision (f)(4) provides that a bone fracture *is* a serious bodily injury. Finally, the *Nava* case is not binding on this court. Although defendant points to language from our Supreme Court as additional support for his argument that the "injuries listed in CALCIM No. 2655 are merely illustrative," that case addressed a different instruction and crime altogether. In *People v. Santana* (2013) 56 Cal.4th 999, our high court discussed serious bodily injury in the context of instructing the jury on mayhem using CALCRIM No. 803. The court saw "no basis . . . to superimpose a wholesale definition of 'serious bodily injury' from section 243(f)(4) in the [mayhem] instruction" and ultimately decided that proof of serious bodily injury is not a separate element of mayhem. (*Santana*, at p. 1010.) The court in *Santana* did not even mention in passing, much less opine on, the issue presented here; the language from *Santana* cited by defendant is inapposite.

Because the prosecutor's statements regarding serious bodily injury were legally correct, the prosecutor did not commit misconduct.

IV

Pitchess *Motion*

Defendant asks us to conduct an independent review of the sealed records of the trial court's hearing on his *Pitchess* motion to obtain discovery of the relevant officer's personnel records. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1225-1226.) We have done so and find no error.

With a *Pitchess* motion, a criminal defendant can "compel discovery" of certain information in police officer personnel files. The defendant must first demonstrate good cause by making "general allegations which establish some cause for discovery" of the

information and by showing how it would support a defense to the charge against him. (*Pitchess v. Superior Court*, *supra*, 11 Cal.3d at pp. 536-537; see Evid. Code, § 1043, subd. (b)(3).) If the trial court concludes good cause has been established, the custodian of the officer's records brings to court all the potentially relevant records and, in camera, the trial court determines whether any information from the records need be disclosed to the defense. (*People v. Mooc*, *supra*, 26 Cal.4th at p. 1226.)

We will not disturb a trial court's ruling on a *Pitchess* motion absent an abuse of discretion. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039.) Having independently reviewed the sealed transcript of the *Pitchess* proceeding, we conclude the court followed proper *Pitchess* procedures and did not erroneously withhold any information. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 646-648.)

DISPOSITION

The conviction for providing false identification to a police officer (§ 148.9, subd. (a); count three) is reversed. As modified, the judgment is affirmed.

/s/
Duarte, J.

We concur:

/s/
Blease, Acting P. J.

/s/
Murray, J.